Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANGEL DIAZ, *et al.*,

Appellees,

vs.

SHELDON SILVER, in his official capacity as Speaker of the House for the Assembly of the State of New York, *et al.*,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

C. DANIEL CHILL
Counsel of Record
ELAINE M. REICH
STEVEN MALLIS
GRAUBARD MOLLEN & MILLER
Attorneys for Appellant
600 Third Avenue
New York, New York 10016
(212) 818-8800

QUESTIONS PRESENTED

1. Whether the district court erred in using an "effects" test rather than the appropriate legislative "motivation" test in finding New York's 12th Congressional District unconstitutional.

2. Whether the district court erred in granting summary judgment and impermissibly engaged in fact finding rather than issue finding when it found New York's 12th Congressional District unconstitutional without the benefit of an evidentiary hearing or trial.

3. Whether the district court erred in failing to accord full faith and credit to the 1992 *Reid* state court judgment when the parties would have been bound by *res judicata* under New York state law.

PARTIES TO THE PROCEEDINGS

The appellant is defendant below Sheldon Silver, Speaker of the New York State Assembly.

The appellees are plaintiffs below Angel Diaz, Denise L. Motley and Reynaldo Coholo.

Other defendants below are Joseph L. Bruno, President Pro Tem and Majority Leader of the New York State Senate, George E. Pataki, Governor of the State of New York; the Board of Elections of the State of New York; Owen T. Smith, Evelyn J. Aquila, and Helena M. Donohue, Commissioners of the Board of Elections of the State of New York and various unknown and unnamed John Does.

The intervenors below are Delco L. Cornett; Margarita Lopez; Louis Garden Acosta; Peter Lau; John Kuo Wei Tchen; Congresswoman Nydia Velazquez; Congressman Major R. Owens; Congresswoman Carolyn B. Maloney.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The unreported opinion and judgment of the three-judge district court is reproduced in the separately bound appendix to this jurisdictional statement ("J.S. App.") at A-1 and A-78.

JURISDICTION

The final judgment of the three-judge district court from which appeal is taken granted plaintiff summary judgment, declared New York's 12th Congressional District unconstitutional and ordered the New York State Legislature to develop

on or before July 30, 1997 a new Congressional Districting Plan. Speaker Silver's notice of appeal was filed on March 25, 1997 (J.S. App. A-81). The Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The relevant federal statutory provisions are § 2 and § 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. §§ 1973, 1973c, the pertinent parts of which are reproduced at J.S. App. A-83-85. The state statute creating the Congressional Districting Plan at issue is Chapters 137 and 138 of the New York State Laws of 1992.

STATEMENT

Prior Proceedings

The results of the 1990 census required that New York's Congressional delegation be reduced from 34 to 31 members. The partisan division between the Republican majority of the New York State Senate and the Democratic majority of the New York State Assembly had complicated efforts at agreement, as a result of which the Legislature was unable to pass a districting plan within the time constraints of the original election calendar.

(i) The *Reid* State Court Action/Referees' Plan

Thereafter, an action was brought before the Supreme Court of the State of New York, County of Kings, entitled *Reid v. Marino*, Index No. 9567/92 (the "*Reid* action"), in which the plaintiffs asked the court to adopt a constitutionally valid plan. Three referees were appointed by the *Reid* court to conduct hearings and propose a districting plan.

Both houses of the State Legislature were defendants in the *Reid* action. Each advocated a different districting plan.

Preliminary maps of the referees' districting plan were presented at a hearing before the state court on June 2, 1992, and the referees' final report recommending a districting plan was issued on June 4, 1992. The *Reid* court's judgment adopting the referees' plan, which was "to govern the election of Members of Congress at the November 1992 election and subsequent elections," was issued on June 8, 1992.

(ii) The *PRLDEF* Federal Court Action/Lacey Plan

Shortly after the commencement of the *Reid* action, a second action, entitled *Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, Civil Action No. 92-1521 (SJ, GCP, JSM) (the "*PRLDEF* action"), seeking virtually the same relief, was brought before a three-judge federal court in the United States District Court for the Eastern District of New York. Both houses of the state legislature were defendants in the *PRLDEF* action. As in *Reid*, each house advocated its own distinct districting plan.

By Order dated May 12, 1992, the three-judge court named Frederick B. Lacey, a former federal judge from New Jersey, as a Special Master to redraw New York's Congressional district lines. The court ordered him to submit his plan for redistricting on May 26, 1992, or as soon thereafter as he was able to complete a plan that complied with the requirements of law. Judge Lacey proposed a Congressional districting plan on or about May 27, 1992 ("The Lacey Plan").

On June 3, 1992 the *PRLDEF* court conducted a hearing at which it indicated that it would impose the Lacey Plan unless the legislature enacted a districting plan by June 10, 1992 and had that plan precleared by the Justice Department pursuant to § 5 of the Voting Rights Act.

The primary difference in the districting criteria used by the *Reid* court referees and Judge Lacey was that the referees took incumbency into account, while Judge Lacey bluntly stated in his Report to the *PRLDEF* Court:

> the concept of preserving seats of incumbents, *and the concerns of incumbency were not included in my hierarchy of guiding principles.*

(iii) The Legislature's Actions

As evidenced by their advocacy before the *Reid* and *PRLDEF* courts, both houses of the legislature had an abiding interest in protecting incumbency and the resultant seniority of the members of New York's Congressional delegation, particularly in light of the fact that New York's delegation was to be reduced by three seats. Both the Senate and the Assembly were of the view that the Lacey Plan would devastate incumbency.[1]

In light of the *PRLDEF* court's declaration that it would impose the Lacey Plan if the legislature did not enact a plan, the legislature had only two choices. It could do nothing and jeopardize the incumbency of New York's Congressional delegation with the resultant Lacey Plan; alternatively, it could enact a plan of its own. However, in view of the binding effect of the *Reid* judgment, the state court *Reid* plan was the only option available to the legislature.

In light of the legislature's overarching goal of protecting incumbents, the legislature was faced with an unpalatable, but extremely limited choice compelled by the federal court's edict imposing the Lacey Plan if the legislature did not itself enact a plan and have that plan precleared before June 10, 1992: (a) the Legislature could do nothing and allow the *PRLDEF* court to impose the Lacey Plan and destroy the incumbency and concomitant seniority of the already reduced numbers of New York's Congressional delegation; (b) alternatively, the legislature could enact the plan incorporated in the *Reid* judgment. That state court *Reid* plan, although disfavored by the legislature in many respects, was not, in the

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[1] The *PRLDEF* court itself noted the Legislature's "vehement dislike" for the Lacey Plan. *PRLDEF v. Gantt*, 796 F. Supp. 681, 697 (E.D.N.Y. 1992).

legislature's view, as destructive of incumbency as was the Lacey Plan. However, as parties to the *Reid* action bound to its judgment, the Senate and Assembly could only act to adopt the totality of the *Reid* plan; the legislature could not change the state court plan in any way. Motivated primarily, if not solely, by considerations of incumbency, including the avoidance of the pairing of incumbents and the preservation of core constituencies, the leaders of the two houses of the legislature, who had previously been unable to agree upon a districting plan, agreed to enact the state court *Reid* plan which addressed in part the legislature's incumbency concerns. The legislature chose to enact the *Reid* plan in order to protect incumbency from the destruction that it believed would have resulted from imposition of the Lacey Plan.

Therefore, as evidenced by the affidavits of persons integrally involved in the districting process, including the legislative leaders themselves, and as corroborated by contemporaneous newspaper reports, the predominant motivation of the legislature in enacting the *Reid* plan was to protect incumbents.

Accordingly, on June 8, 1992, the State Senate passed a bill enacting the redistricting plan incorporated in the *Reid* judgment. On June 9, 1992, the State Assembly enacted the same bill. On or about June 12, 1992, the Governor signed into law the congressional redistricting bill that had been passed by the two houses of the legislature.

THE QUESTIONS ARE SUBSTANTIAL

I. THE DISTRICT COURT'S DECISION AND JUDGMENT FAILED TO APPLY THE APPROPRIATE LEGAL STANDARD SET FORTH IN THIS COURT'S GOVERNING AUTHORITIES WHEN IT FOUND THAT THE PREDOMINANT LEGISLATIVE MOTIVE FOR DRAWING THE 12TH CONGRESSIONAL DISTRICT WAS IMPERMISSIBLY RACIAL.

A. The Need To Show A Racially Discriminatory Purpose Or Motivation In Order To Sustain An Equal Protection Claim

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). "*[P]urposeful discrimination* is 'the condition that offends the Constitution.'" *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 [1971])(emphasis added). *See also Shaw v. Reno*, 509 U.S. 630, 642 (1993)("*Shaw I*")(the Equal Protection Clause's "*central purpose* is to prevent the States from *purposefully discriminating* between individuals on the basis of race")(emphasis added).

Thus, to show a violation of the Equal Protection Clause, "[p]roof of racially discriminatory *intent or purpose* is required . . . ." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)(emphasis added).

As this Court stated in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), "[t]he plaintiff's burden is to show . . . that race was the predominate factor *motivating* the legislature's decision . . . ." *Id.* at 2488 (emphasis added). Further, this Court noted in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996)("*Shaw II*") that "[t]he constitutional wrong occurs when race becomes the 'dominant and controlling' *consideration*." *Id.* at 1900

(emphasis added). *See also Bush v. Vera*, 116 S. Ct. 1941, 1951-52 (1996) ("[f]or strict scrutiny to apply . . . race must be '*the predominant* factor *motivating* the legislature's [redistricting] decision'")(citation omitted; emphasis added and in original).

B. The Overwhelming Evidence As To The Legislature's Predominant Motive Of Incumbency Protection

The New York State Legislature demonstrated to the district court that the legislature's predominant motivation in enacting the plan containing the 12th Congressional District had nothing to do with race and everything to do with a traditional districting factor, namely incumbency.[2]

As described more fully *supra*, it was (1) the *PRLDEF* court's unwillingness to (a) defer to the state court proceedings and (b) give full faith and credit to the *Reid* judgment and (2) the *PRLDEF* court's insistence that only a legislative plan would forestall implementation of the Lacey Plan, that triggered the legislature to enact the *Reid* court plan. But for the presumptive position taken by the *PRLDEF* court, there would have been nothing motivating the legislature to take such action. Indeed, as previously stated, the legislature was bound by the judgment of the *Reid* court at the time legislative action on the plan embodied therein was taken.

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[2] As Justice O'Connor noted in her separate concurrence in *Bush v. Vera*, 116 S. Ct. 1941, citing to earlier decisions of the Court, "[o]nly if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply." *Id.* at 1969 (emphasis added). Here, the overwhelming evidence shows that the Legislature did not "neglect" traditional districting criteria in deference to race in enacting the districting plan. Rather, the Legislature's primary motivation here in enacting the *Reid* court's plan was to protect incumbency, a long recognized, "race-neutral," traditional districting criterion. *See Bush*, 116 S. Ct. at 1954; *cf. Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)("The reality is that districting inevitably has and is intended to have substantial political consequences.")

The consequence of the *PRLDEF* court's actions was to put the legislature in the position of either enacting the state court plan (whose terms it could not vary) or doing nothing and risking the imposition of a federal court plan that was destructive of incumbency protection.

The motivation that compelled the legislature to act to protect incumbency was thus triggered by the *PRLDEF* court's intention to impose the Lacey Plan in the absence of legislative action. The legislature's decision to take any action at all was caused by the federal court's intrusion into the state's districting process and was thus wholly separate and apart from any motivation that the state court referees might have had in crafting the districting plan.

Indeed, the district court conceded that

> [t]here is also no question that the Legislature likewise considered incumbency; nor was there anything improper in its doing so. The legislators voiced their quite legitimate concerns about the ability of representatives to maintain relationships they had already developed with their constituents. More significantly, the powerful role that seniority plays in the functioning of Congress makes incumbency an important and legitimate factor for a legislature to consider.

J.S. App. A-56 (citation omitted).

Nevertheless, the district court concluded that race predominated over incumbency in the creation of the 12th Congressional District stating:

> The important role that incumbency played is best summarized as follows: only when the perceived racial requirements of the VRA were met did incumbency become the *principal focus of the referees' plan*, and incumbency was always sacrificed to meet these racial requirements. Incumbency was always secondary to race.

J.S. App. A-57 (emphasis added).

In reaching their conclusion that race and not incumbency predominated in the creation of the 12th Congressional District, the district court thus focused exclusively on the *referees' intent* and utterly ignored the overwhelming direct and uncontradicted testimonial evidence that the *legislature's motive* in acting was incumbency protection and not race.

Specifically, the district court completely disregarded the testimony of Ralph Marino, the State Senate Majority Leader and President *pro tem* of the New York State Senate[3] that Republicans in the State Senate believed that the Lacey Plan would have a negative impact upon the political interests of their party including their interest in protecting incumbents. J.S. App. A-87.

Similarly scorned by the district court was the direct testimony of Benjamin Chevat, Chief Counsel to the Speaker of the New York State Assembly[4] who testified from personal knowledge that:

> [I]n the opinion of Speaker Weprin and the Assembly majority, *the plan crafted by Special Master Lacey . . . was completely destructive of incumbency and, in our opinion, would have caused the defeat of many Democratic incumbents and resulted in the loss of their influence and power based upon their seniority in Congress.*
>
> * * *
>
> [T]he primary and overwhelming motivation of the Assembly in passing the redistricting plan incorporated in the *Reid* judgment was to protect

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[3] As discussed, *infra* at p. 19, n.7, the Senate Majority Leader is the individual who unilaterally controls all legislation passed in the Senate.

[4] Saul Weprin the Assembly Speaker at the time the bill was passed died prior to the commencement of the instant law suit.

> Congressional incumbency by acting to prevent the Lacey plan from being ordered by the *PRLDEF* court.

J.S. App. A-89 (emphasis added).

Also not discussed by the district court is the fact that Mr. Chevat's affidavit was corroborated by Roman Hedges, a member of the Legislative Task Force on Demographic Research and Reapportionment, appointed by the Speaker of the Assembly.

A massive number of contemporaneous news reports detailing the fear and anxiety of the legislature in respect of the Lacey Plan and the concomitant legislative motive in enacting the *Reid* plan as its only viable alternative was submitted to the district court and likewise ignored by it. A small number of representative examples follow:

On June 2, 1992, the New York Times reported:

> Adding a new twist to the tangle of Congressional redistricting in New York, a panel appointed by a *state court today released a plan that would provide substantially more protection for more incumbents than a competing plan proposed last week in a Federal court.*
>
> * * *
>
> *The Republican Senator who is a co-chairman of the Legislature's redistricting panel, Dean G. Skelos of Nassau County, said in a telephone interview tonight that the Senate majority leader, Ralph J. Marino, had reacted favorably to the state court plan because it could help insure New York's delegation of maximum seniority in Congress in a year when many incumbents were retiring in other states.*

Sam H. Verhovek, *New York Court Throws a State Plan Into Redistricting Fray*, N.Y. Times, June 2, 1992 at B1 (emphasis added).

On June 3, 1992, the New York Times reported:

> After months of political paralysis, the Republican leader of the State Senate suddenly urged the Legislature today to pass a Congressional redistricting plan that was designed by a state court panel.
>
> *The urgent call for action by the Senate majority leader, Ralph J. Marino, an Oyster Bay Republican, was an effort to pre-empt a panel of Federal judges who could decide as early as Wednesday to impose their own redistricting plan. Officials with the Republican-led Senate, the Democratic-majority Assembly, and the state's 34-member Congressional delegation said today that governmental leaders generally agree that the state court plan is more advantageous for incumbents than the Federal court plan.*
>
> * * *
>
> *Legislative leaders from both parties agreed that the Lacey plan would wreak havoc with incumbent members of Congress.*

Kevin Sack, *G.O.P. Leader Supports State Court District Plan*, N.Y. Times, June 3, 1992 at B4 (emphasis added).

On June 4, 1992, the New York Times reported:

> In United States District Court in Brooklyn yesterday, a three-judge panel announced after a day long hearing that *it would give the Legislature one week to pass the state court plan or risk the court-ordered imposition of the Federal plan.* Yesterday's developments make it likely that the Legislature will do just that.
>
> * * *
>
> *[T]he plan [the Lacey plan] generated chaos in the Congressional delegation by setting up prospective contests between prominent incumbents. . . .*

Kevin Sack, *Albany Legislators Agree On Plan For Revised Congressional Lines*, N.Y. Times, June 4, 1992 at A1 (emphasis added).

Also, on June 4, 1992, the Daily News reported:

> Assembly Speaker Saul Weprin (D-Queens) ended the months-long Albany paralysis by *reluctantly accepting a plan crafted by referees* appointed by a Brooklyn Supreme Court justice.
>
> The same plan got a green light Tuesday from Senate Majority Leader Ralph Marino (R-Nassau).
>
> "*(The referees' plan) is not our preference*, but if the Senate passes it, we will," Weprin said through a spokesman.
>
> * * *
>
> Both houses are drafting redistricting bills and a vote could come as early as Monday. If signed by Gov. Cuomo, the redistricting plan would still have to pass muster with the Justice Department.
>
> *Weprin's move was announced during a hearing in Brooklyn Federal Court dealing with a rival federally drawn proposal that, if enacted, would have hit the current incumbents like a political hand grenade.*

Joel Benenson and Frank Lombardi, *Referees' District Plan Okd*, Daily News, June 4, 1992 at C11 (emphasis added).

The district court did not find these contemporaneous news accounts of the legislature's motives worthy of comment.

In sum, the district court did not address or deal with any of the foregoing overwhelming direct evidence of the legislature's desire to protect incumbency as the moving force in passing the New York State Congressional Districting Plan.

C. The District Court's Erroneous Employment Of The Effects Test

Thirty years of this Court's decisions to the contrary notwithstanding, the district court analyzed the legislature's actions under an erroneous "effects test" legal standard instead of the applicable subjective motivation test commanded by this Court's binding precedents.

The district court's opinion ascribes a predominant racial motivation to the legislature's action because the legislature was "aware" of the race based motivation of the *Reid* court referees.

> The legislature *was fully aware* of the perceived need to create majority-minority districts within New York City.

J.S. App. A-48 (emphasis added).

Similarly, the district court echoes that theme in its heading "The Legislature's *Acquiescence* in the Use of Race." J.S. App. A-50 (emphasis added).

However, established equal protection jurisprudence holds that a legislature's awareness that a law, if enacted, will have a racial impact, standing alone, does *not* establish a discriminatory purpose. To establish a violation of the Equal Protection Clause, a claimant must prove that the legislature enacted the law precisely "because of" its racial effects. *See Miller*, 115 S. Ct. at 2488; *Feeney*, 422 U.S. at 279.

In *Feeney*, Massachusetts had enacted a civil service law that gave a life-long preference to veterans. The plaintiffs challenged the law under the Equal Protection Clause of the Fourteenth Amendment on the ground that the statute had a disparate impact upon women since, among other reasons, more than 98 percent of veterans within the state were male. Plaintiffs argued, as the district court held here, that the state legislature's awareness of the discriminatory consequences of the legislation sufficed to establish the requisite

discriminatory intent. *Id.* at 278. Plaintiffs in *Feeney* were wrong (as is the district court here).

In *Feeney* this Court squarely addressed the issue of the legislature's awareness of the discriminatory effects of the veteran's preference statute on women. In fact, the two dissenting justices in *Feeney* observed that the legislative history of the statute reflected the State's "patent appreciation of the impact the preference system would have on women . . . ." 442 U.S. at 284. A concurring opinion by the lower court similarly observed that since "'the cutting off of women's opportunities was an inevitable concomitant of the chosen scheme,'" the result must be deemed to have been intended by the legislature. *Id.* at 278.

This Court disagreed that legislative awareness and acquiescence in the inevitability of discriminatory consequences are determinative of legislative purpose under the Fourteenth Amendment. Acknowledging that the state legislature must have been aware that most veterans are male and that the statute would therefore have adverse consequences for women, this Court expressly rejected the argument that knowledge of a statute's discriminatory effects establishes a discriminatory legislative purpose. This Court stated:

> "*Discriminatory purpose,*" . . . *implies more than intent as volition or intent as awareness of consequences.* . . . [N]othing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted *because* it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachussets Civil Service.

Id. at 279 (citations and footnote omitted; emphasis added).

The principle that "awareness" of the discriminatory effects of a statute is not determinative of a discriminatory legislative purpose in enacting the statute was squarely reiterated by this Court in the districting context in *Miller*. There, the Court quoted its *Feeney* precedent and went on to admonish:

> The *distinction between being aware of racial considerations and being motivated by them* may be difficult to make.

115 S. Ct. at 2488 (emphasis added).

Accordingly, it is clear that a legislature's knowledge that a law, if enacted, will have a racially disproportionate effect does not, standing alone, establish discriminatory purpose. *See Miller*, 115 S. Ct. at 2488; *Feeney*, 442 U.S. at 279.

Similarly, the legislature here cannot be charged with an improper motivation in enacting the *Reid* court's plan, irrespective of the factors that may have motivated the court-appointed referees in drawing this plan. The reason is that there is no evidence at all that the legislature enacted the referees' plan "because of" the racial composition of any of the districts therein, including the 12th Congressional District. The factors considered by the state court referees in drawing the districts comprising the *Reid* court plan simply are not determinative of the legislature's motivation in adopting the plan. Here, the evidence is overwhelming that the legislature enacted the *Reid* court's plan, a plan embodied in a judgment it could not vary, primarily to avoid the imposition of the incumbency-destroying Lacey Plan. The legislature's primary motivation was to protect incumbency; not draw districts on the basis of race.

The district court ascribed the requisite dominant racial motivation of the legislature by reason of the legislature's submission to the Justice Department of the Referees' Report as part of its § 5 preclearance requirements

> whatever their non-racial concerns, by attaching the referees' report to their Department of Justice preclearance submission, the Legislature affirmatively adopted the race-based methodology and rationale the referees used to create the plan.

J.S. App. A-50.

The clear import of the district court's assertion is that the mere fact that the legislature used the referees' report in its submission to the Justice Department, *ipso facto*, imputes an impermissible racial motivation to the legislature. To the contrary, the submission of racial data is probative only of the legislature's desire to comply responsively with the State's preclearance obligation pursuant to § 5 of the Voting Rights Act; it is not probative of the legislature's intent underlying the adoption of the plan that it submitted.

The district court's contention is directly contrary to governing authority of this Court. Section 5 of the Voting Rights Act has explicitly been declared constitutional by this Court in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Section 5 of the Voting Rights Act, applicable to "covered" jurisdictions such as New York, requires that the state obtain "preclearance" of any "'standard, practice, or procedure with respect to voting,'" including Congressional districting plans, by showing that the proposed change does "'not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.' 42 U.S.C. 1973c." *Miller*, 115 S. Ct. at 2483.[5] Thus, by definition, § 5 retrogression analysis implicates the submission and analysis of racial data since by its very terms, it requires that the legislature discuss racial characteristics of districting plans.

Indeed, the regulations promulgated by the Justice Department under § 5 of the Voting Rights Act require that "covered" jurisdictions seeking preclearance set forth, among other things, "[a] statement of the reasons for the change," "[a] statement of the anticipated effect of the change on members of racial or language minority groups," and "[a] statement identifying any past or pending litigation concerning the change or related voting practice." Procedures For The

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[5] The *PRLDEF* court itself required that the legislature make such a § 5 submission and obtain preclearance, in the absence of which the *PRLDEF* court had announced its intention to install the Lacey Plan. The *PRLDEF* court so ruled despite the fact that the *Reid* court plan existed in the form of a judgment binding upon the legislature.

Administration of Section 5 Of The Voting Rights Act of 1965, As Amended ("VRA Procedures"), 28 C.F.R. § 51.27 (1995).[6] By attaching to its § 5 submission the referees' report (which sets forth the history of the litigation and reasons for the change in districting, and describes the plan and its anticipated effect upon protected minorities), the legislature simply was addressing the requirements of the governing federal regulations.

Nothing in the referees' report speaks to the legislature's motivation. Indeed, at the time the referees' report was issued the legislature had not acted as a body. Patently then, mere submission of racial data by the legislature via the referees' plan, in the unique factual circumstances of this case as described at length *supra*, cannot be the basis of a finding that this legislature was motivated primarily by race in enacting the districting plan in question. Obviously, no adverse implications can be drawn from such a submission as it implicates only the legislature's awareness of race, not that race was the legislature's predominant motive.

The district court also expends considerable effort knocking down the straw man argument that the legislature sought to excuse its alleged constitutional violation on the grounds that the "Justice Department made us do it."

> [I]n cases of racial gerrymandering, such as the one before this court, a legislature will be held responsible for the resulting constitutional violations in *spite of contentions that the legislature was merely attempting to comply with the perceived maximization requirements of the Justice Department.*

J.S. App. A-50 (emphasis added).

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[6] In addition, those regulations recommend the submission of demographic information concerning race as a means of "facilitat[ing]" review by the Attorney General. VRA Procedures, 28 C.F.R. § 51.28 (1995).

> The Legislature must bear responsibility for the constitutional violations in its plans, even if its actions were a consequence of pressure imposed by DOJ's erroneous interpretation of the VRA.

J.S. App. A-55.

> But the Supreme Court has not responded kindly to legislators' arguments that DOJ's interpretation of the VRA compelled their race-based redistricting plans.

J.S. App. A-54.

Unlike *Miller v. Johnson*, 115 S. Ct. at 2492-94, the legislature in this case has never made the argument that it passed the redistricting plan because of pressure from the Department of Justice to maximize minority districts. The legislature has consistently maintained that its motivation for passing the instant redistricting plan arose solely out of incumbency protection concerns resulting from being caught between the Scylla of the anti-incumbency Lacey Plan and the Charybdis of the flawed but more incumbent-friendly *Reid* court plan. Lacey and *Reid* were the legislature's only two choices and the legislature chose *Reid*, albeit "reluctantly" to protect incumbents in spite of its racial flaws and not because of them. Mere awareness by a legislature of unconstitutional effects resulting from a legislative act does not supply the requisite unconstitutional motivation for invalidating the act. *See Miller*, 115 S. Ct. 2475; *Feeney*, 442 U.S. 256.

Finally, the district court purportedly finds racially based legislative motivation from

> statements by legislators during the Senate and Assembly debates regarding the adoption of the plan . . . and statements by legislators during hearings before the special master.

J.S. App. A-47-48.

In New York State, statements of individual legislators have no probative value in ascertaining legislative motivation. It is an accepted tenet of political reality in New York -- and the internal rules of the legislature reflect -- that all substantive legislative decisions, especially ones as politically sensitive as the redistricting of New York's congressional districts, are made solely by two people, the Majority Leader of the State Senate[7] and the Speaker of the State Assembly.

The legislature submitted testimony in respect of the motivations of these two individuals who in real life made the redistricting decision. J.S. App. A-86-89. The district court ignored the foregoing testimony entirely. Instead, it focused on selective out of context statements of certain individual legislators (not the leaders).

For example, the district court points to a so-called "acknowledgment" by one Senator Gold that the legislature specifically "adopt[ed] the [referees'] plan's methodology." J.S. App. A-51, n.16. However, nowhere in the quoted portion of Senator Gold's statement does such an alleged acknowledgment of "methodology" appear. In fact, neither the quote itself nor the district court's citation to Senator Gold's comments contains a reference to race. To the contrary, the district court's citation makes clear that Senator Gold was "discussing", not race, but rather the philosophy of "incumbency protection." *Id.* Further, Senator Gold was a senator from the party in the minority in the State Senate, and was a vocal opponent of and voted against the congressional redistricting legislation. It is hard to discern how one can ascribe legislative motivation based on the out-of-context statements of a single legislator *opposed* to the bill.

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[7] In fact, a well-known citizen's watchdog group, "The New York Public Interest Research Group" ("NYPIRG") publicly accused the New York State Senate Majority Leader of having "the most undemocratic legislative rule in the nation." News Release from the NYPIRG, *National Survey of States' Legislative Rules Released* (Jan. 7, 1997).

Similarly, the district court *cites* a statement by Senator Skelos as explaining the 12th Congressional District's shape (J.S. App. A-31), which the transcript in context shows to relate to another district entirely and which had "nothing to do with a minority district" and everything to do with protecting the seat of a white incumbent.

By contrast to these inapposite recitals, the incumbency protection motivation of the legislature is confirmed by the statements of numerous individual legislators during the Senate and Assembly debates, which the district court had before it, but chose to disregard. Indeed, Latino legislators railed against the plan as elevating incumbency over Latino rights. *See, e.g.*, Assemblyman Lopez ("'we have to weigh the poor incumbents to the needs of the Latino community.' Again we lose . . ." J.S. App. at A-26); Assemblyman Del Toro ("I don't believe that this legislature should be a party to anything that smacks of racial and ethnic gerrymandering. . . . I don't believe that we should necessarily draw these districts to protect incumbents whatever they may be." J.S. App. A-27).

Thus, the *enactment* of the legislative plan was driven by the legislature's understanding and fear that its failure to pass the Referees' Plan would result in the devastation of incumbents under the Lacey Plan. As Assemblyman Gantt explained in his opening remarks, which the district court acknowledges and quotes early in its opinion, "we are stuck with a situation that this [*Reid* court plan] is the only game in town, and we must do that." J.S. App. A-24.

II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT DID NOT CONSTITUTE THE "SENSITIVE AND DELICATE INQUIRY" COMMANDED BY *MILLER* AND *BUSH*.

The determination of a legislature's motivation in connection with an Equal Protection challenge "*demands a sensitive inquiry* into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. at 266 (emphasis added).

In the districting context, particularly because of the fundamental role played by the States, the court's "sensitive inquiry" into a legislature's motivation is all the more circumscribed. As this Court stated in *Shaw II*:

> Applying traditional equal protection principles in the voting-rights context is "a most delicate task. . . ."

116 S. Ct. at 1900. In *Miller*, this Court cautioned:

> Federal Court review of districting legislation represents a serious intrusion into the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State."
>
> * * *
>
> The courts, in assessing the sufficiency of a challenge to a districting plan, *must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus.* Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the districting process. *Shaw*, *supra*, at ___, 113 S.Ct., at 2826; see *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) ("'[D]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects") (footnotes and citation omitted). *The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise*

> *extraordinary caution* in adjudicating claims that a state has drawn district lines on the basis of race.

115 S. Ct. at 2488 (emphasis added).

The district court's grant of summary judgment[8] declaring the 12th Congressional District unconstitutional is the only reported post *Shaw I* case in which congressional lines were declared unconstitutional without a hearing or trial. In the circumstances, the failure to grant the legislature even a rudimentary hearing, let alone a trial, hardly constitutes the appropriate sensitive and delicate inquiry commanded by this Court's precedents.

Indeed, in a variety of situations involving subjective intent or motivation, this Court has cautioned that summary judgment is generally inappropriate. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)(unlawful discharge of Federal employee)("[t]hese variables explain in part why questions of subjective intent so rarely can be decided by summary judgment"); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (defamation)("[t]he proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition" [citations omitted]); *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 500 (1969)(antitrust)("'[w]e believe that summary procedures should be used sparingly . . . where motive and intent play leading roles . . .'"); *White Motor Co. v. U.S.*, 372 U.S. 253, 259 (1963)(antitrust)("[s]ummary judgments . . . are not appropriate 'where motive and intent play leading roles'" [citation omitted]).

The district court concedes that like *Bush*, the instant case is a "mixed motive case." The district court stated:

> "*Bush v. Vera*, ___ U.S. ___, 116 S. Ct. 1941 (1996), provides facts most similar to the present

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[8] The district court did not even permit oral argument on the summary judgment motion.

> case. Like the situation before this court, it was a 'mixed motive case'. . . ."

J.S. App. A-54.

Bush, however, emphasizes that in a "mixed motive" case "*[a] careful review* is, therefore, necessary to determine whether these districts are subject to strict scrutiny." 116 S. Ct. at 1952 (emphasis added). In fact, much of the disagreement between Justice O'Connor's plurality opinion and Justice Stevens' dissenting opinion turns not on legal issues, but on a disagreement between the two opinions with respect to the complex facts adduced after trial.

> In the application of our precedents to District 30, our disagreement with Justice STEVENS' dissent . . . is largely factual.
>
> * * *
>
> The dissenters misread us when they make the leap from *our disagreement about the facts of this case* to the conclusion that we are creating a "stalemate" by requiring the States to "get things just right,". . . .

Id. at 1957 n.*, 1960 (emphasis added).

Certainly then, at a minimum, in a mixed motive case appropriate divination of legislative motivation from a complex fact pattern makes the granting of summary judgment inappropriate for the sensitive and delicate inquiry demanded by this Court in redistricting cases. *Miller* speaks directly to this issue. It cautions district courts against the use of summary judgment in redistricting cases as follows:

> *Of course courts must also recognize these principles and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed.* See, *e.g., Fed. Rules Civ. Proc.*

12(b) & (e), 26(b)(2), 56; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

Miller, 115 S. Ct. at 2488 (emphasis added).

In determining a legislature's motivation, this Court in *Arlington Heights*, indicated that a court should consider, *inter alia*, "historical background[,] . . . [t]he specific sequence of events leading up [to] the challenged decision, [and] . . . [t]he legislative or administrative history. . . ." 429 U.S. at 267-68.

Had the legislature been permitted a trial, it would have been able to demonstrate by way of just such a historical background the specific sequence of events leading up to the precise critical role the Senate Majority Leader and the Assembly Speaker played in the legislative process in New York (J.S. App. A-86-89) and why the testimony detailing the legislative conundrum with respect to the Lacey and *Reid* plans, which the district court ignored, would have demonstrated that plaintiffs failed to sustain their burden of showing that the legislature, in enacting the districting plan, was motivated primarily by racial considerations.

This Court's admonition in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), that before granting summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor", has not been heeded by the district court here. It resolved conflicting material issues of fact (*i.e.*, Senator Marino's testimony versus that of Senator Gold) in respect of legislative motivation without benefit of trial and the attendant cross-examination. The district court erroneously undertook issue resolution not an issue finding inquiry.

By rushing[9] pell mell to summary judgment and not even giving the legislature a chance at a hearing or trial, the district

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[9] There was no practical reason for the district court to rush. The district court denied plaintiffs' motion for injunctive relief which sought to enjoin the 1996 New York Congressional elections. Accordingly, this case easily

(Footnote continued)

court hardly showed the appropriate deference to the legislature that this court has unremittingly required in redistricting cases. *See Miller*, 115 S. Ct. at 2488; *Growe v. Emison*, 507 U.S. 25, 33-34 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

III. THE DISTRICT COURT ERRED IN NOT ACCORDING FULL FAITH AND CREDIT TO THE *REID* COURT'S JUDGMENT HOLDING CONSTITUTIONAL THE NEW YORK STATE CONGRESSIONAL REDISTRICTING PLAN.

This Court has held that:

> [28 USC] Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466, *reh'g denied*, 458 U.S. 1133 (1982)(footnote omitted).

New York "has adopted the transactional analysis approach in deciding *res judicata* issues. Under this analysis, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 688 (1981)(citations omitted; emphasis in original). *See also Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 826 (1984); *Schwartz v. Public Adm'r. of Bronx*, 24 N.Y.2d 65, 298 N.Y.S.2d 955 (1969); *Schuykill Fuel Corp. v. B & C Nieberg Realty Corp.*, 250 N.Y. 304, 306-07 (1929).

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can still go to trial in 1997 on a full record thereby assuring a complete resolution of the constitutional issues prior to the 1998 Congressional elections without unnecessarily truncating the process.

The very question of whether the 1992 Congressional redistricting plan meets the constitutional requirements of the Fourteenth and Fifteenth Amendments was addressed by the parties and intervenors and judicially determined in the State court *Reid* action. *Parties representative of, and in privity with,* the Hispanic-Latino and African-American plaintiffs herein were parties to the State Court *Reid* action.

A. There Is No Privity Impediment To *Res Judicata*

The district court in a footnote disposed of the legislature's *res judicata* argument by finding, *inter alia*, no privity between the parties in the two cases. J.S. App. A-40-41, n.13.

The legislature had premised its privity argument on the fact that de facto class action status obtained against members of the Latino class in *Reid*, so as to bind the Latino plaintiffs in this case from relitigating the issues raised by the Latino parties in the *Reid* case. Contrary to the district court's assertion, New York State has long recognized de facto class actions even absent formal class certification so as to bind others similarly situated even though not in privity in the ordinary sense.[10]

Here, all Hispanic-Latino and African-American voters share a common relationship to the same protections of the United States Constitution. The claim of unconstitutionality by Hispanic-Latino and African-American voters raised here belongs to the group comprising those voters. Hence, the litigation to judgment of that claim in the state court is "effective to preclude other actions predicated on the same wrong

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[10] Indeed, when the sovereign is a party to the action, as here, New York State law actually forbids formal class certification. *Rivera v. Trimarco*, 36 N.Y.2d 747, 368 N.Y.S.2d 826 (1975). *Accord Baumes v. Lavine*, 38 N.Y.2d 296, 305, 379 N.Y.S.2d 760, 767 (1975); *Jones v. Berman*, 37 N.Y.2d 42, 371 N.Y.S.2d 422 (1975); *see also Bronson v. Bd. of Educ.*, 525 F.2d 344 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied sub nom. Jackson v. Bailey*, 376 U.S. 910 (1964).

brought by other . . ." Hispanic-Latinos and African-Americans. *Parkoff v. Gen. Tel. & Elecs. Corp.*, 53 N.Y.2d 412, 420, 442 N.Y.S.2d 432, 436 (1981). Like shareholders in the derivative action setting, Hispanic-Latino and African-American voters are "members of a represented class", *Green v. Santa Fe Indus., Inc.*, 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 796 (1987), whose rights in common have been adjudicated, given the undisputable fact that the Fourteenth and Fifteenth Amendment rights of Hispanic-Latino and African-American voters were advocated, considered and adjudicated in the State court action.

Although required to do so by this Court's binding precedents, *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986); *Kremer*, 456 U.S. 461; *Allen v. McCurry*, 449 U.S. 90 (1980), the district court paid no attention to the aforesaid body of New York State decisional law.

B. No Change In Constitutional Law Occurred

The district court, citing *Miller*, 115 S. Ct. at 2492-94, also maintained that "res judicata may no longer apply" "where there exists a major change in constitutional law, as has occurred here" J.S. App. A-41, n.13. The district court is plainly wrong.

First, *Miller*, makes no claim that this court was announcing a major change in constitutional law. In fact, in *Shaw I*, upon which *Miller* builds, Justice O'Connor went to great lengths to explain that the Court's recognition that white voters could mount a Fourteenth Amendment challenge to a districting plan was based upon settled principles of law in redistricting cases under the Fourteenth and Fifteenth Amendments that date as far back as the 1960's.

Second, *Shaw I* cites with approval this Court's 1964 decision in *Wright v. Rockefeller*, 376 U.S. 52 (1964) and explicitly states that in *Wright*, "[e]very member of the Court assumed that the plaintiffs' allegations that the statute 'segregate[d] eligible voters by race and place of origin' stated a constitutional claim," but disagreed over whether the

plaintiffs had carried their burden of proving that the districts had been drawn with the intention of segregating voters based on race and place of national origin. *Shaw I*, 509 U.S. at 645 (citations omitted). The facts in *Wright* and the claims asserted therein are indistinguishable from those in *Shaw I* and from plaintiffs' claims here. Patently, then, *Miller* simply carried forward *Wright* precedent and effected no "major change in constitutional law."

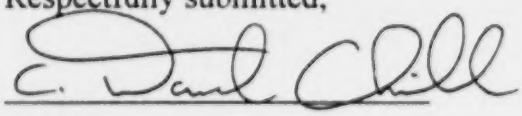
Third, as Justice O'Connor discusses, the holding in *Shaw I* (and by extension, *Miller*) is consonant with long-established Supreme Court Equal Protection jurisprudence requiring strict scrutiny of legislation distinguishing among citizens because of their race, even if the classification, although race-neutral, is "'unexplainable on grounds other than race.'" 509 U.S. at 643 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 [1977]).

In short, as *Shaw I* makes clear, the district court's announcement that *Shaw I* and its progeny, including *Miller*, made major changes in constitutional law is simply wrong.

CONCLUSION

For the foregoing reasons, Appellant Silver respectfully submits that the questions he presents are substantial and that this court docket this appeal for full briefing and argument. In the alternative, this court should accept jurisdiction of this appeal, reverse the final judgment of the district court which declared, *inter alia*, New York's 12th Congressional District unconstitutional, and remand to the district court with instructions to hold a full trial with respect to the legislature's motivation in enacting the congressional districting at issue in this case.

Respectfully submitted,



C. DANIEL CHILL
Counsel of Record

ELAINE M. REICH
STEVEN MALLIS

GRAUBARD MOLLEN & MILLER
600 Third Avenue
New York, New York 10016-2097
(212) 818-8800

Attorneys for Appellant
Sheldon Silver, The Speaker of
the New York State Assembly

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